IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.2059 OF 2005

IN

SUIT NO.1968 OF 2005

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Parmanand T. Manwani & Anr. ...Plaintiffs

v/s.

Madan Devkishandas Bhatia & Anr....Defendants

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Mr.Sanjay Jain i/b Lalit Jain for the Plaintiffs.

Mr.M.P.Vashi for Defendant No.1.

Mr.G.W.Mattos, AGP for Defendant No.2.

Mr.S.C.Naidu for Defendant No.3.

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**CORAM: D.K.DESHMUKH, J.**

**DATED:** 29th MARCH,2007

**P.C.:**

1. This Notice of Motion is taken out by the Plaintiffs. The Plaintiffs have filed this suit basically for a decree of specific performance of the MOU dated 26th July, 2005. That MOU is at Exh.D. It appears that the property which is the subject matter of the MOU is owned by the Defendant No.2/ Maharashtra Housing & Area Development Authority. It is given on lease to the Defendant No.1. Defendant No.1 agreed to assign his lease in favour of the Plaintiffs on certain terms and conditions.

2. The MOU itself states that the MOU is entered into subject to prior permission of the Defendant No.2. The MOU further states that the Plaintiffs who had entered into the MOU have entered into agreement as Chief Promoter of Steelman Co.op. Housing Society (proposed).

3. The documents placed on record shows that contrary to the agreement between the parties, the Defendant No.1 applied to the Defendant No.2 for

their permission for assignment of the lease, styling himself as the Chief Promoter of the proposed society. It appears that the Defendant No.2 granted their permission, but they have stated in their affidavit in reply that permission was obtained by making false representation that the Defendant No.1 is the Chief Promoter of the proposed society. It is an admitted position that there can be no assignment without obtaining prior permission of the Defendant No.2. Admittedly, there is no prior permission obtained by anybody for assignment of lease in favour of the Plaintiffs or proposed society of which the Plaintiffs are the promoters. Therefore, it cannot be said that the Plaintiffs have made out a strong prima facie case that they are likely to get decree of specific performance of the agreement.

4. In my opinion, if only one reason is to be given for holding that the Plaintiffs do not have a prima facie case that reason would be that admittedly there can be no assignment by Defendant No.1 of his leasehold rights without obtaining prior permission of Defendant No.2. Grant or refusal of permission is in the discretion of the Defendant No.2. When performance of agreement depends entirely on the

volition of a third party, it cannot be said, with any degree of certainty, that the court will make a decree of specific performance of such a contract, specially when the grant of decree of specific performance is in the discretion of the court. The Plaintiffs can not take advantage of the permission granted by MHADA, because obviously that permission has been obtained by making misrepresentation to MHADA. Pursuant to the MOU, which shows that the Plaintiffs are the Chief Promoters of the proposed society, even application for permission of Defendant No.2 has not been made. Therefore, firstly the Plaintiffs will have to pray for a decree directing the Defendant No.1 to apply for the prior permission of the Defendant No.2. But in the plaint there is no prayer for such a decree. This shows that the plaint is incomplete.

5. Taking overall view of the matter, as the Plaintiffs do not have any prima facie case, there is no question of granting any interim order in favour of the Plaintiffs. Notice of Motion is, therefore, disposed of.

. Ad-interim orders, if any, operating are vacated.

. The learned Counsel appearing for the Plaintiffs at this stage makes a request that the operation of the ad-interim orders should be continued.

. It is already come on record that the Defendant No.1 has entered into transaction with the Defendant No.3 and therefore no useful purpose will be served by continuing the ad-interim orders. Request is, therefore, rejected.

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